FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

GEORGE H. MIFFLIN ET AL.

No. 267. *v.*

BENJAMIN F. DUTTON ET AL.

GEORGE H. MIFFLIN ET AL.

No. 268. *v.*

THE R. H. WHITE COMPANY.

BRIEF FOR THE APPELLANTS.

STATEMENT OF THE CASES.

These are two bills in equity against booksellers for the infringement of the copyrights in "The Professor at the Breakfast Table," by Dr. Oliver Wendell Holmes, and "The Minister's Wooing," by Mrs. Harriet Beecher Stowe. A demurrer was filed to each bill, which has been sustained in the Circuit Court and in the Circuit Court of Appeals, and the questions arising thereon now come to this court on appeal. The infringements complained of are some of the fruits of the controversy in Holmes *v.* Hurst, 174 U. S. 82, as the books here complained of are published by the defendant in that case. It appeared in that case that the publishers of the *Atlantic Monthly* had neglected properly to secure copyright during the year 1858, and consequently "The Autocrat of the Breakfast Table," which was published serially in that magazine during that year, became public property. The works involved in the present suits were published serially in the same magazine during 1859, and the publishers were seemingly equally forgetful in securing copyright, but a closer examination showed that a valid copyright was secured on the December number, and that "The Minister's Wooing" was published in book form and properly entered for copyright before the publication in the magazine of

the last thirteen chapters, which appeared in the November and December numbers.

The facts in the two cases are different, in that "The Professor At The Breakfast Table" did not appear in book form until after the completion of the serial publication in the magazine, so that only that portion of the book which had appeared in the December number is claimed to be under copyright. "The Minister's Wooing," however, was published in book form and duly copyrighted before the issue of the November number, so that the thirteen chapters appearing in the November and December numbers are claimed to be under copyright.

These suits were brought to enjoin the sale of books containing the concluding portions of both stories on which we claim that the copyright was good, and for an accounting for the sale of books so unlawfully published.

The facts, and contentions, with relation to each book may be more specifically stated as follows: —

"THE PROFESSOR AT THE BREAKFAST TABLE."

This work, as has been said, was not published in book form until after it had been serially published in the *Atlantic Monthly*. The copyright notice in the book was in the name of Dr. Holmes, while the only copyright notice in the December number of the magazine in which the last instalment of the story appeared was in the name of Ticknor & Fields, the publishers. Dr. Holmes took the proper steps for the renewal of his copyright at its expiration, if the deposit of the title and copies of the book, and not of the magazine in which it originally appeared, constituted a renewal and such renewed copyright was assigned to appellants.

This action is brought to restrain the publication of a book containing the instalment published in the December number, on which copyright was duly claimed, and for the profits from such sale.

The questions raised by the demurrer in this case are four, only the first of which has been discussed in the opinions of the courts below.

(1) Whether copyright notice in the work when published in book form in the name of Dr. Holmes instead of the publishers, in whose name the notice had appeared in the December number, destroys his copyright, although proper notice was at all times given in his name in the publication in book form.

(2) Whether the publication of the earlier instalments without

copyright being secured prevents the copyright on the remainder from having validity, on the ground that the whole story constitutes one work.

(3) Whether the publication of the book under its proper title destroys copyright because the entry for copyright had been made as a part of the *Atlantic Monthly* and under its title.

(4) Whether the copyright was properly renewed by deposit by Dr. Holmes of the title of his work and a copy of it, the defendant claiming that the copyright could only be renewed by deposit of a copy of the magazine in which the work originally appeared.

The appellants contend, —

First. That notice in the name of the author and owner of the copyright is correct, the publishers acting as his agents in protecting his work as part of the magazine that no one was, or could have been, misled, and that the change in the form of the copyright notice from the magazine to the book does not affect the author's rights, because the statute requiring notice has been ***substantially complied with,*** for the reasons set forth below in connection with "The Minister's Wooing."

Second. That copyright can always be secured for a part of an entire work, even if copyright on the other part has been lost.

Third. That the copyright on a magazine covers all its contents and their titles, and each separate article may be republished under its proper title without losing such copyright. To require each article to be republished under the name and number of the magazine would cause endless and absurd confusion. We contend that an author may change the title of his work as often as he pleases without impairing the validity of his copyright, as the statute is silent as to change of title.

Fourth. That the renewal right under the statute belongs to the author alone, and the statute was complied with.

"THE MINISTER'S WOOING."

"The Minister's Wooing" appeared serially in the *Atlantic Monthly* during the year 1859. The contract between Mrs. Stowe and her publishers, Phillips, Sampson & Company (No. 267, Rec., page 6), provides that all rights of republication in book form were reserved to the author. Owing to the publisher's neglect, the author failed to establish her copyright in the first twenty-nine chapters, which appeared in the first ten numbers of the *Atlantic Monthly* for the year. After these had appeared, the author published the whole work in book form on October 15, 1859, and

proper steps were taken to secure copyright on the book, notice of copyright being given therein in the name of Harriet Beecher Stowe. At the date of this publication the last thirteen chapters of the work had not been otherwise published, but were subsequently in the November and December numbers by Ticknor & Fields, to whom the *Atlantic Monthly* had been sold, and in accordance with an arrangement with Mrs. Stowe by which the contract between her and Phillips, Sampson & Company was assigned to Ticknor & Fields. These two numbers contained on the page following the title page a copyright notice in the name of Ticknor & Fields, and in addition contained on the pages on which the instalments of the story began, a notice that copyright had been secured in Great Britain and France. The author took the necessary steps to renew her copyright in 1887 before it expired, and the renewed copyright was duly assigned to the appellants. The questions raised by the demurrer are two, only the first of which has been discussed in the opinions of the courts below.

One, — whether the failure to insert a copyright notice ***in the name of the author*** in the November and December numbers of the *Atlantic Monthly* destroys her copyright, although proper notice was given ***in the name of the publishers*** who had by contract a limited interest in her copyright.

Two, — whether the publication of a portion of the book before the initial step to secure copyright was taken destroys copyright on that portion of the book subsequently published, this being identical with the second contention in the "Professor" case.

The appellants contend, —

First, — that in spite of a variance between the form of the copyright notice in the book and in the magazine, the statute requiring notice has been ***substantially complied with***, as the notice in the magazine was in the name of the publishers, who were the agents and representatives of the author in making the serial publication, and no one could be possibly misled by the variance.

Second, — that conceding that copyright on the first twenty-nine chapters of the book has been lost, yet the copyright on the chapters published after the proper entry for copyright had been made is good, and an account should be ordered for any profits made by the appellees therefrom.

Although the copyright in each case has expired since the bills were filed, and consequently an injunction will no longer be of

value, an account remains to be taken, if the appellants are entitled to recover. These cases are of far-reaching consequence, however, to both authors and publishers, as the procedure as to copyright notices in these cases has been followed for many years in case of works originally appearing in magazines. Some of our most famous literary works have thus appeared, and it has been an almost universal custom to give copyright notice in the name to the author when the work is republished in book form. It is only in recent years that, in an excess of caution, notice in the author's name has been inserted in the magazine in addition to the notice in the name of the publishers. A decision dismissing the bills in this case would therefore put in jeopardy many valuable copyrights throughout the United States. It has also been the custom of a publisher in issuing an edition of a work originally published by another publisher who has given the copyright notice in his own name, to change the name in such notice to his own, so as to eliminate entirely from the title page the name of the original publisher. Neither publisher had any other than a contract interest in the copyright, and each was acting for and in behalf of the author in giving the notice. If such change in the form of notice is bad, many valuable copyrights will be destroyed by a decision to that effect.

POINTS OF ARGUMENT.

I. The copyrights in these cases are good, and the change of name in the notices from publisher to author in Dr. Holmes' case, and from author to publisher in Mrs. Stowe's case, is an immaterial variance, because: —

(*a*) The decisions in the United States have never held a copyright bad unless some essential element in the notice has been wholly omitted, or unless it is misleading.

(*b*) Many informalities in such notices have been sustained, so long as they contained all the elements and did not mislead, and the statute had been substantially complied with.

(*c*) No one has been misled in these cases, or could have been misled by the notices complained of.

(*d*) The statute has been substantially complied with because: —

1. A magazine notice is distributive and protects the work of each contributor, although he is not specially named in the notice.

2. The relation between author and publisher is so close as to constitute such an identity of interest that notice in the name of the publisher is equivalent to notice in the name of the author.

3. The law secures copyright to the author alone, and it belongs to him, although registered in the name of his publisher.

4. Where copyright is registered in the publisher's name, the courts treat the author as the real owner, and allow suits by him for protection of his copyright.

5. The copyright protection secured by the publisher of a magazine enures to the benefit of each contributor and secures copyright to each.

6. The appellees are seeking to take advantage of an attempt by the author to secure copyright twice, and claim that double notice to them is no notice at all.

(*e*) The statutory protection of literary property is a compensation given by the public to the author for dedicating his work to the public, and the public faith is pledged to secure him in his rights.

(*f*) The history of the copyright idea in America shows the solicitude of the State for the author and his rights.

(*g*) The history of the notice clause shows that its purpose is merely to prevent the ignorant from being misled to their harm.

(*h*) The English decisions show that the name in a notice may be changed as the proprietorship of the copyright changes, so long as the change is not misleading.

II. Copyright may be secured for part of a work.

III. The use of the separate and proper title of a magazine article on republication in book form is not a change of title, and even if it were the author may change the title of his copyrighted work on a subsequent publication.

IV. Copyright may be renewed by an author, although the original steps to secure it were taken in the name of his publishers and for a magazine of which the copyrighted work was but a part.

ARGUMENT.

I.

The principal question in these cases is whether the change of the name in the copyright notices

from publisher to author, or vice versa, destroys the copyrights.

The main question in these cases is the one which has been considered in the courts below, namely, whether the clause of the statute requiring a notice of copyright to be printed in each copy of the work is to be construed strictly and technically, or whether, considering the history and purpose of this clause, the court will say that a form of notice is good which contains the essential features required by statute, to wit, the name, claim of exclusive right, and date when obtained; in other words, whether the change in the notice from the publishers' name to that of the author vitiates the copyright of "The Professor," and whether the change from the author's name to that of the publishers is equally fatal to "The Minister's Wooing."

The solution of this question depends partly upon a consideration of the effect of the statute on literary property, and partly on the basis of, and reasons for, this requirement of notice.

A careful examination of the decisions in our own courts on this notice requirement will show the liberality that has been freely exercised in sustaining defective or informal notices.

(a) The decisions in the United States on the requirement of notice have never held a copyright bad unless some essential element has been wholly omitted, or such notice is misleading.

Coming to the consideration of the law in the United States, it is noted that this question is to be determined under the Act of 1831.

Bulletin No. 3, of the Copyright Office, p. 35.

The fifth section thereof prescribing the form of notice is as follows:—

"No person shall be entitled to the benefit of this act unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title page, or the page immediately following, if it be a book, . . . the following words, viz.: 'Entered according to act of Congress, in the year ——, by A. B., in the clerk's office of the district court of ——.'"

It will be noticed that it is less precise in its terms in regard to the name of the party to be inserted in this notice than is the statute now in force, Act of June 18, 1874, Sect. 1.

Bulletin No. 3, p. 54.

In the latter statute it is further provided that the notice shall contain "The name of the party by whom it was taken out," and it has been said that this quoted clause was "added for the purpose of preventing any ambiguity as to the character of the notice which should accompany the use of the word copyright,"

Werckmeister *v.* Springer Lith. Co., 63 Fed. Rep. 808, per Townsend, J.

In fact, the earlier statute, as will be seen on examination, was not precise at all, and in using the initials "A. B." in Sect. 5, it is submitted that they were used merely to fill the blank and to indicate that some name was to be inserted. As there is no reference to the preceding section, where the letters A. B. are used to fill in one blank as well as the letters C. D. to fill another, it cannot be necessarily said that the legislature intended that the party designated by A. B. was to be the same in the two sections.

A. B. may be a shifting or changing party. In the case of Rock *v.* Lazarus, L. R. 15 Eq. 104, the parties composing Rock & Co. changed from time to time, and were different parties from those composing the firm at the time the notice was first engraved.

See, also,

Scribner *v.* Clark, 50 Fed. Rep. 473.

The decisions have universally been opposed to any insistence on a literal compliance with the terms of the statute in regard to the form of this notice. It is enough if the notice calls attention to the claim of copyright, the year in which the claim was made, and some duly authorized person of whom inquiry can be made. The real name of the person claiming copyright need not appear, but a trade name is sufficient.

Bleistein *v.* Donaldson Lith. Co. decision in this court Feb. 2, 1903.

Scribner *v.* Henry G. Allen Co., 49 Fed. Rep. 854.

Scribner *v.* Clark, 50 Fed. Rep. 473, s. c. 144 U. S. 488.

Werckmeister *v.* Springer Lith. Co., *ubi supra.*

In this last case Judge Townsend said, and here he was speaking of the present statute: —

"The object of the statute was to notify the public of the claim of copyright and to enable it to ascertain the party by whom it was taken out. . . . If any one desires to ascertain who claims the copyright of this painting, he will more readily succeed if informed that the owner is Photographische Gesellschaft, than if he is informed that it is Emil Werckmeister."

In the same way it furnished more information to inquirers to know that application could be made to Ticknor & Fields, publishers, having a well-known place of business, than to Harriet Beecher Stowe or Dr. Oliver Wendell Holmes, and this is particularly true of a serial publication. Any person desiring to secure the right to publish the work in book form, or any other inquirer, would naturally either address the publishers directly or address the author in care of the publishers.

This suggestion would have less force if there were not a relation between author and publisher by which there was a joint interest in the copyright. In these cases, the publishers had, by contract, a right to the serial publication, and in making this publication they were also acting as the agents and representatives of the author. A magazine copyright is distributive and secures to each author publishing his work in the magazine his copyright. By this we do not mean that the copyright as a grant of monopoly from the Government is divided into fractions. There is no such grant of monopoly, and the certificate of record by the Librarian of Congress has no analogy or resemblance to the patent issued under the seal of the Government in case of inventions. The author's literary property is secured to him by conforming, either through himself or his agent, to certain statutory requirements. In the case of a magazine it is commonly and inaccurately said that the copyright is taken out by the publishers and belongs to them. That is not true, except in those few cases where they are also the proprietors of the literary material, but where the authors reserve to themselves the property in their compositions and the right of republication in book form, the proprietor of the magazine has no more than the limited right of serial publication for which he has contracted, and incidentally the right to protect himself in that property.

We shall refer again to this branch of the subject, and we return to the consideration of the interpretation of the notice clause by our courts.

In

Sarony *v.* Burrow-Giles Lith. Co., 17 Fed. Rep. 591,

Judge Coxe said, where it was objected that the notice did not contain the Christian name of the holder of the copyright: —

"The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished who *ignorantly and innocently* reproduces the photograph without the knowledge of the protecting copyright. . . . The strict technical rules of pleading in the criminal courts furnish but slight analogy for the guidance of the courts in determining what interpretation shall be given to this statute." (Italics are ours.)

When this case was heard by this court on appeal it was said that the object of the statute is to give notice to the public "of the name of the *author*." This is exactly what was done in the book notice of Dr. Holmes' copyright. Undoubtedly that phraseology was used with reference to the facts of that case, and had the facts called the attention of the court to a case where the notice was in the name of the publisher or proprietor, it would certainly have used some phrase equivalent to the name of the author or some one acting for or on behalf of him. What the court meant, we submit, was that the public were entitled to a proper source of information as to the ownership of the copyright.

Lithographic Co. *v.* Sarony, 111 U. S., 53.

In

Hoertel *v.* Tuck, 94 Fed. Rep. 844,

Judge Lacombe says: —

"While the courts have been liberal in holding *any form of notice* sufficient which contains the essentials, — 'the name, claim of exclusive right, and date when obtained,' — they have not yet sustained the sufficiency of a notice which *wholly omits* some one of these three essentials."

The italics in the above quotation are ours, but we submit that the courts have never gone further than this statement as thus emphasized. There must be an entire omission of some one or more of the three essentials, and there is no case where a copyright has been held to be lost by reason of a defective notice, except where some essential element required by the statute has been ***entirely omitted;*** such, for instance, as the date,

Thompson *v.* Hubbard, 131 U. S. 123.
Osgood *v.* Aloe Instrument Co., 69 Fed. Rep. 291,

or the place where the deposit of copy and title is required to be made,

Jackson *v.* Walkie, 29 Fed. Rep. 15,

(although we submit that this case was wrongly decided on too literal an interpretation of the statute), or some word, such as "registered" is used instead of "copyright"; the two words conveying, as the court points out, widely different meanings.

Higgins *v.* Keuffel, 140 U. S. 428.

The six cases just cited are those relied on by the circuit judge in his opinion. We have no quarrel with them, as they do not touch our contention that the change of name from principal to agent or *vice versa* is not an *entire omission* of name, and as we have pointed out, they decide nothing more than that such omission of an essential feature of the notice is fatal.

(b) Many informalities in such notices have been sustained, so long as they contained all the elements and did not mislead, and the statute had been substantially complied with.

On the other hand, a wide range of informality has been disregarded by the courts. In

Snow *v.* Mast, 65 Fed. Rep. 995,

Judge Sage, in upholding an abbreviated date of "'94" in a copyright notice, said in defence of this abbreviation: —

"The object of the statute is to give notice of the copyright to the public, and it would be too narrow a construction to hold that the abbreviation '94 is insufficient. In Werckmeister *v.* Mfg. Co., 63 Fed. Rep. 445, 452, the court said that there was enough in the notice to give any one who was looking for the truth and desiring to avoid infringement the thread which would lead him easily to the *actual condition of the copyright*, and held that this was sufficient."

This was not exactly the language of Judge Putnam in that case, but that judge did say, in referring to the case of Lithograph Co. *v.* Sarony in this court: —

"Thus in a single sentence the Supreme Court has torn down the structure of apparent literalness on which the defendant relies."

There can be no pretence in these cases that the publisher of the infringing books here complained of could not have found in either

form of notice not only the thread which would have easily led him to the actual condition of the copyright, but all the necessary information, had he been "*looking for truth and desiring to avoid infringement.*" There can be no doubt that this is a case where the reprinter rests his defence on what he claims is a technical defect in the complainant's copyright, and not in the least on any mistake he has made by reason of any act, or omission, of either the authors or their publishers.

In

Falk *v.* Schumacher, 48 Fed. Rep. 222,

Judge Coxe swept aside an objection to the form of notice, saying,

"The statute was ***substantially*** complied with."

See, also,

Hefel *v.* Whitely Land Co., 54 Fed. Rep. 179.

In

Bolles *v.* Outing Co., 77 Fed. Rep. 966,

the Circuit Court of Appeals held that the notice "Copyright '93 by Bolles, Brooklyn," was a sufficient compliance with the statute, although strictly and technically the identification of the author and the date were not as required by the statute, the court entering into a somewhat elaborate argument to show that '93 must mean 1893 and not 1793, because photography was not invented at the earlier date, adding, —

"Could any person possibly be ***misled*** by the omission of the figures denoting the century."

Judge Wallace at the same time called attention to the general rule of law that in any notice prescribed by law the *full name* of the party must be given for the purpose of identification, and a designation by the initial letter or letters of the first name will not suffice.

The true test of the sufficiency of a copyright notice is its likelihood to mislead.

We submit that the true test of the sufficiency of a notice lies in an answer to the question whether the notice is in any way ***likely to mislead*** any one as to the rights of the authors or the owners of the literary property which they are about to appro-

priate. Whether or not the notice is calculated to mislead any one to his injury is the real and only test, assuming that the three essential elements of the statute appear in some form. This test was laid down with great force in

Callaghan *v.* Myers, 128 U. S. 617,

where the printed title was deposited by "E. B. Myers and Chandler," while the notice in the published books was by "E. B. Myers" alone. This court held the ***"Variance immaterial and the statute substantially complied with, particularly as it was not shown that the defendants were misled by the variance or induced to do or omit anything because of it."*** This case is important because it shows the lengths to which this court has gone in upholding a copyright. Here the title was deposited January 28, 1867, while the notice in the book gave the year as 1866. The statute provides (Rev. Stat., Sec. 4953) that "copyright shall be granted for the term of twenty-eight years from the *time of recording the title thereof*"; in this case from January 28, 1867. This court brushed aside the literal interpretation of the statute, and said: —

"The variance is immaterial, inasmuch as the statement that the title was recorded in an earlier year than the actual year, being conclusive upon the person taking the copyright, could cause no injury to any other person or to the public, because the copyright would expire twenty-eight years from the expiration of the year stated in the notice in the book and *not twenty-eight years from the time of the recording of the title.*"

It would have been a simple thing for this court to have followed the narrower construction of the statute by the Circuit Court in the earlier case where a mistake in the date was held fatal,

Baker *v.* Taylor, 2 Blatch. 82;

see, also,

Schumacher *v.* Wogram, 35 Fed. Rep. 210;

but this court was clearly not inclined to place any narrow construction upon the requirements of the notice clause of the statute.

Another test is whether the statute has been substantially complied with.

The rule has been laid down in another form by Judge Drummond, when the case of Myers *v.* Callaghan was heard in the

Circuit Court (5 Fed. Rep. 726), that the statute must be "***substantially and in good faith complied with,***" and if that appears, the court looks no further. He says: —

"It may be admitted, therefore, that every person who claims a copyright to a book, conferred by act of Congress, must show that the provisions of the act have been complied with. But there is what may be called the original right of the author. It is the object of the act of Congress to 'secure' the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They are passed in order to make that right after publication, in the language of the constitution, 'exclusive.' So that I am not inclined to agree with the strict construction which has been placed on the acts of Congress by some of the courts. It seems to me, on the contrary, that these various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work."

In Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195, a work was published in five volumes, and the copyright notice appeared only in the first volume. The case was heard in the Circuit Court before two judges, and it was held "that full notice had been given to the public of the plaintiff's copyright in this work, and, in the opinion of the court, the law had been ***substantially complied with,***" and the decision was based on the ground that the copyright acts "are remedial, and made in favor of the aggrieved party, and to secure his rights."

Why should the author lose the fruits of his labor and be obliged to see it appropriated by a pirate who has not a shadow of a claim that he acted in ignorance of the author's rights? We concede that the courts have no power to protect an author who has not complied with the requirements of the statute. If he has wholly omitted his notice or some essential portion of it, the courts cannot, it is true, repair the omission, but, following the reasoning of Marshall, C. J., in Grant *v.* Raymond, *infra*, the courts can protect him from the consequences of an innocent or inadvertent mistake. The court could not have upheld the reissued patent if some condition precedent had been *wholly* omitted by the inventor, but if this court can say that specifications which do not describe the invention can form a basis for a valid patent, it is surely within its power to say that a copyright notice which names the agent instead of the principal protects the author in his property. The two forms of notice give the public a full and accurate state-

ment of the situation. The reader of the magazine learns from the notice therein that the publishers have an interest in the serial publication, and the public are warned that it cannot be reproduced without their permission. The reader of the book learns from the notice therein that the author has reserved to himself the right of publication in book form. Who can be *misled* by this double form? How can it relieve the pirate from liability to know that republication by him may expose him to litigation from two sources?

(c) No one has been misled in these cases or could have been misled by the notices complained of.

As to "The Minister's Wooing," it cannot fairly or with even a show of right be contended that the publishers of the work which the defendants are selling were *misled* or deceived by the notice of copyright. The demurrer admits that "all of which copies were copied by defendants from said thirteen numbers of the *Atlantic Monthly*, and were exact copies, word for word." In making this exact copy of the last thirteen chapters of "The Minister's Wooing" their eye must have been arrested by the words "Copyright secured by the author in Great Britain and France." It is inconceivable that they supposed that "the author" had neglected the much more important protection of the work in the land of its birth. They also saw that the entire contents of the magazine were protected. In whose name? In the name of her publishers. No one familiar with the publishing business could have failed to understand the situation. There was some publishing arrangement between Mrs. Stowe and her publishers by which they had some right of publication and she had the general right. The notices told the exact fact. By assignment of Phillips, Sampson & Co., whose work for ten months the defendants had been copying, "word for word," Ticknor & Fields had the serial rights for the remaining chapters. The notice of serial rights in the publisher of a magazine carries with it notice of the author's general copyright.

As to "The Professor at the Breakfast Table," it cannot be contended that any one has been *misled* by this change in the form of the notice. When the magazine was published, the public were duly informed by the notice on the titlepage that copyright on that issue of the magazine, and on each and every article therein, had been duly secured. In so entering the magazine for copyright, the publishers were acting in behalf of, and as the agents

for, each and every author giving them a right of publication in that issue. Later, when "The Professor at the Breakfast Table" appeared in book form, the notice of copyright informed the public that the registration of the magazine for copyright by the publishers was, so far at least as "The Professor at the Breakfast Table" was concerned, made by them as agents for, and in behalf of, Dr. Holmes and to secure *his* copyright. The public were thus informed of the entire transaction. They were notified that the publishers were protected in their right to multiply copies of the magazine; and they were further notified that, so far as Dr. Holmes was concerned, the publishers had no greater right, inasmuch as helater gave notice in his own name of his copyright and the right reserved to him to reproduce the work in book form. When the sale for the magazine was at an end, the publishers had then no more than a nominal interest in the copyright, and further notice in their names was calculated to mislead the public as to the real ownership of the copyright.

(d) The statute has been substantially complied with because:—

1. The magazine notice is distributive and carries entire protection for each contributor, although not specially named in the notice.

It has been claimed hitherto that the notice in the November and December numbers of the magazine was for the sole purpose of giving notice of the copyright claimed for the magazines; that is, it secured the magazine copyright to the publishers, and cannot be availed of as protection for Mrs. Stowe's story.

The answer to that is, that if the notice in the book had been in the name of the publishers, it would certainly not have been necessary in the subsequent publication in the magazine to have given two notices in identically the same form, one for the story and one for the magazine as a whole. The statute does not in terms call for such exactness, and there is no reason why such a provision should be implied through judicial interpretation.

A further answer is that there is no such thing as a magazine copyright. The notice in the magazine simply called attention to the fact that copyright was claimed for the entire contents of the magazine, but it did not pretend to indicate, nor was it called on to indicate, the time when the steps for securing copyright had been taken, other than that they were all taken within the limits of the year 1859.

The notice in the magazine called public attention to the fact that the entire contents were *protected* by copyright. So far as "The Minister's Wooing" was concerned, it notified the public that the publishers were acting in behalf of the author in protecting her rights while publishing as a serial the story she had already published in book form, just as they were acting for each and every other contributor.

As to "The Professor," counsel must concede that if the book had contained the notice in the form in which it appeared in the magazine, the statute would have been complied with literally and exactly. What, then, becomes of the claim that the notice in the magazine was a notice of a magazine copyright and could not be availed of for Dr. Holmes' work? Such literalness would mean a separate copyright notice for every article in the magazine. As we have pointed out, however, the term "magazine copyright" is both misleading and inaccurate. There is no patent right, as a whole, for the particular combination composing the magazine. The literary property therein is secured to the authors or proprietors, as the case may be, and while there may be technical questions as to the names in which suits for infringement may be brought, such questions cannot affect the ownership of the literary material for which protection is sought. So far as the "Professor" was concerned, there was no magazine copyright as distinguished from the book copyright. Dr. Holmes' right to protection had, or had not, been secured, and that is all there is to it. When the work appeared in book form the only question was whether the protection so secured was lost or not. Our contention is that the change of name from agent to principal was an immaterial variance, because it gave no opportunity for any one to be misled, and no one has been, in fact, misled.

2. The relation between author and publisher is so close as to constitute such an identity of interest that notice in the name of the publisher is equivalent to notice in the name of the author.

There is a peculiar force in the contention that the relation between author and publisher is so close that notice in the name of the latter is a notice of his author's rights.

The relation is that of principal and agent. The publisher spreads the author's thought in tangible form before the public. He is answerable to the author for his own personal conduct. Any discredit to him discredits the author also. The publisher is

the herald who announces, proclaims, and makes public the author's work. The relation is in the highest degree personal. It is non-assignable except by consent of the author.

Hole *v.* Bradbury, L. R. 12 Ch. D. 886, 897.
Stevens *v.* Benning, 1 K. & J. 168, 174.

In both of these cases, the court held that an author could interfere to prevent assignees of the publishing firm with whom he had contracted from continuing to publish a book without the author's consent.

This peculiarly personal relation between publisher and author was ably argued by Sir Walter Scott in a case involving his own interests. He says: —

"In no profession under heaven are there so many and such singular shades of gradation as among booksellers, or, as they are more properly called, publishers; and the question with respect to selecting a publisher is one of the most important which can occur to a man of letters in the course of his career. The circumstances tending to influence such a choice are as various as important. There are men in the trade the respectability of whose names would accredit works of a very dubious tendency, and there are such as would discredit the 'Whole Duty of Man.'

"There are publishers whose imprint would sell to a certain extent the most paltry catchpenny that ever came from Grub Street, and there are others upon whose shelves and counters the most popular work would become stationary.

"The connection of the booksellers with the works of periodical criticism will affect a work bearing their imprint, favorably or otherwise. Their place of residence is a consideration not to be despised. The branches of learning in which they have particularly dealt may recommend them or otherwise. In short, not even in the amount of his copy-money has an author such deep interest as in the choice of the person on whose exertions as a publisher the success of his labors must in a great measure depend. His choice, therefore, rests on a distinct *dilectus personæ*, and therefore must be construed as attaching personally to the publisher agreed upon a faculty which he is to exercise in person, and which he cannot in justice be permitted to endorse away to another." ("Reminiscences of Sir Walter Scott," by John Gibson, p. 28, in Library of Boston Athenæum.)

This reasoning was adopted by the court to which it was addressed, and has received the express approval of Lord Abinger, who says: "I must own his [Sir Walter Scott's] reasoning appeared satisfactory to me."

Gibson *v.* Carruthers, 8 M. & W. 343.

There is, we submit therefore, that identity of interest between the two that renders a copyright notice in the name of either, a sufficient and substantial compliance with the Act, in order to secure to the author the fruits of his genius.

3. The law secures copyright to the author alone, and it belongs to him, although registered in the name of his publisher.

The Constitution of the United States, Article I, Section 8, gave Congress power to secure to *authors* the exclusive right to their writings. The history of copyright legislation in this country before the adoption of the Constitution shows that such legislation was of a general character "for the purpose of securing a natural right to the fruits of mental labor," while patents were granted by special acts of legislation in each case.

> Curtis' Const. Hist. of the U. S., Vol. I, p. 532.
> Curtis on Copyright, pp. 77–79.

Neither the Constitution of the United States (Art. I, § 8) nor the various statutes have ever contemplated or permitted copyright in any one but the *author* or his assignee. There is no warrant in either Constitution or statute for a publisher, *qua* publisher, taking out a copyright, and, if the statute is to be literally construed, the many thousand copyrights which have been taken out in the names of publishers are void and valueless. It has been for years a general custom for the publisher to take the necessary steps in his own name to secure copyright on the work intrusted to him to publish. If, however, the courts cannot say that in doing this he has acted for the author and the author's benefit as his agent, no copyright has been secured, and the fruits of the author's labors have been wholly lost.

The first Copyright Act (May 31, 1790) carefully limits this right to multiply copies to authors and their "assigns who have purchased or legally acquired the copyright." The Act of 1802 speaks of "the author or proprietor," but nowhere is any right given to any one who is not the actual author or one who has acquired a proprietorship of the writing. The revision of 1831 struck out the word "proprietor" and limited the right to the "author and assigns."

The statutes of the various states were all clearly drawn in the interest of the author and to secure his rights. The original propositions to the Constitutional Convention by Messrs. Madison

and Pinckney which were the foundation upon which the clause of the Constitution rests, referred to authors alone.

2 Morgan, Law of Lit., 146, 147.

Our contention on this point is none other than is contained in the plain words of every statute that has ever been enacted, — that copyright — this privilege or right of multiplying copies — is reserved to the author alone, and enures to him alone unless, and until, he has formally parted with it to another. The result, then, is that if the statute is to be literally and strictly construed, no copyright was secured on the last instalment of "The Professor" in the December number of the *Atlantic Monthly*, although all the statutory formalities were complied with, because they were not done by the author and in his name. For the same reason, no copyright has ever been secured by the publishers of a magazine on any literary work published therein, and not owned absolutely by them, unless the steps to secure copyright on each work were taken independently in the name of the author. The court will take judicial notice of the almost universal custom of publishers for many years to copyright, in their own names, books intrusted to them for publication. On the contention of the appellees, these copyrights are all wholly void; the author has not taken advantage of the statute personally, and the publisher was given no right by the statute, and consequently acquired none, either for himself or the author, by the steps taken. There can be no escape from this conclusion on any literal interpretation of the statute. The law nowhere recognizes copyright in a publisher not the owner of the copyrighted work.

As to the "Professor," the appellees claim that the copyright obtained on the instalment of the story published in the December number was lost because the notice of copyright which subsequently appeared in the book was not the same as that printed in the magazine. It is true that the notices differed, in that the magazine notice was in the name of the publishers, while the book notice was in the name of the author. It appears from the Record (p. 3) that the publishers of the *Atlantic Monthly* had merely the privilege to publish "The Professor at the Breakfast Table" in serial form. The copyright, except for this limited purpose, was clearly in the author, and it was the clear duty of the publishers to secure copyright so that the rights of the author would be protected as well as their own. They were acting as his agents and for his benefit. Such copyright as they secured

was held by them under the terms of the contract and *in trust* for Dr. Holmes.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.
Pulte *v.* Derby, 5 McLean 328, 335.
Lawrence *v.* Dana, 4 Cliff. 1.
Drone on Copyright, pp. 260, 368.

Except for the matter of formal proof of registration, there is no reason why the court should not hold that copyright flows in all cases directly to the author or his assignee. The object of the statute was to protect *authors*, and any theory that a legal title to a copyright is vested in the person in whose name the registration is made is based on a fiction, and on a mistaken notion of the effect of the required registration. The copyright is vested by the statute and the Constitution in the *author* and in no one else, except by his consent. If, for example, registration is made in the name of a publisher, either with or without the author's consent, the copyright is none the less vested in the author. It has been held that in such case an action for infringement may be brought in the name of the author; and in any case, the publisher would have no power to prevent an action in his name.

Lawrence *v.* Dana, *ubi supra*.

4. Where copyright is registered in the publisher's name, the courts treat the author as the real owner, and allow suits by him for protection of his copyright.

The courts have apparently been frequently misled in considering the question of copyright by the analogy of patents, and have frequently treated copyright as an incorporeal right analogous to a patent. As we have before insisted, the statute does no more than to secure to the author rights of reproduction of the fruits of his genius, which, except for the statute, the courts would not protect him in after publication. In many cases, therefore, the courts have spoken of the legal title of the copyright as being in the person by whom the steps were taken to secure it and in whose name registration was had, although at the same time recognizing that the beneficial rights may be in another person, particularly if that person be the author. The courts have frequently recog ized the validity of a copyright taken out in the

publishers' name, by insisting that the change in the form did not vary the substance, and the copyright belonged to the author.

In Pulte *v.* Derby, 5 McLean, 328, the publishers had registered the copyright in their own names under a contract allowing them to publish two editions. The author filed a bill to restrain the publication of a third edition. The court said: "Although the legal title to the copyright is in the defendants, I can only consider it in them for the purposes of the contract. The right covers their interest and protects it so long as they shall be engaged in the publication and sale of the work. *Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright; nor to publish the work except upon the terms of the contract.*"

He goes on to say: "When the agreement was entered into, the complainant (author) had no right to convey. He had a right to his manuscript, which the statute protects, and the property in which would be protected at Common Law. The right to publish this manuscript, which was all the complainant could give, was provided for in the agreement. It was the interest of both parties to have the copyright secured. Without this, the first publication of it would have abandoned it to the public, and consequently it could have been of no more value to either party than to any other publishers or authors who might choose to revise and republish it. The defendants, it appears, secured to themselves the copyright, and the evidence of that right was published on the second page of the book, which was under the eye of the complainant. *He, therefore, sanctioned it.*"

It is clear under the statutes that this "*sanction*" by the author did not vest the copyright in the publishers. The court recognizes that in saying that beyond their contract right "they are not considered as having the right." Judge McLean agrees with Judge Clifford and Judge Lowell in Lawrence *v.* Dana, in holding that the author owns his copyright, even though he has permitted it to be registered in the name of his publisher. How absurd, therefore, to say that he loses the copyright thus secured by giving notice thereof in his *own name.*

In

Scribner *v.* Clark, 50 Fed. Rep. 473,

Judge Blodgett said in speaking of a copyright taken in the name of the publishers, "as the proof shows that Mrs. Terhune settled from time to time with the owners of the copyright for her royalties, the court will presume that *her legal title as author of these books* was in some due and proper manner conveyed to and vested

in the persons who secured the copyright thereof," and this language was quoted by Mr. Justice Blatchford in this court as "a sound view," in

Belford *v.* Scribner, 144 U. S., 488 at p. 504.

In

Lawrence *v.* Dana, 4 Cliff. 1,

the copyright was registered in the name of Mrs. Wheaton, the owner of the text upon which Mr. Lawrence made his annotations; but it appearing that Mr. Lawrence was the real author of the work claimed to be infringed, he was allowed to file a bill in his own name to protect his copyright. It is true that Mrs. Wheaton's representative was made a party defendant, but it does not appear that the bill had any allegation that she had been applied to for permission that suit should be brought in her name, or that the court thought that any such request was necessary, or such permission material. Judge Clifford said that Mrs. Wheaton "acquired therewith the right to copyright the same for the protection of the property, but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the work without the consent of the complainant."

He goes on to say: —

"Beyond controversy she took it out by the *consent* of the complainant (Lawrence), and it is equally clear, in the judgment of the court, that she took it out in *trust for the complainant* when her property in the notes should cease." Mrs. Wheaton had the right, under her arrangement with Mr. Lawrence, to make a limited use of his notes in certain editions of her husband's work on international law; but, although taking out the copyright in her name, she had, as the court puts it, no "*right or title, legal or equitable*, to use the notes" for any other purpose.

Although the court here uses the word "trust" to express the relation between Mrs. Wheaton and Mr. Lawrence, it is clear that it means no more than agency. Mrs. Wheaton's position in regard to the copyright was an agency coupled with an interest, but the *real ownership* of the copyright was in Mr. Lawrence, and in him alone. It could not be in any one else under the statute, and the court here sustained a copyright in the face of the plain words of the statute, if the literal construction contended for by the appellees is to be adopted. There was no warrant whatever in the statute, under this view, for any copyright in Mrs. Wheaton. She was neither author nor an assign. This argument was strongly

made by counsel in the case. The point taken went to the root of the whole case, but the court declined to accept so narrow a view.

This case is on all fours with those at bar. Ticknor & Fields had but a right of serial publication. The copyright belonged to the authors, and whatever Ticknor & Fields did in their names with reference to the works in question was wholly for the benefit of the authors. It matters not whether you call it "trust" or agency; it is all one.

If then, the acts of Mrs. Wheaton were those of Mr. Lawrence, it certainly would have been true that, in publishing his notes as a separate work, Mr. Lawrence could have preserved *his* copyright, although secured for his benefit by Mrs. Wheaton and in her name, by giving notice of that copyright *in his own name*. It would be a narrow construction indeed to say that a man is entitled to secure *his* copyright in the name of some one else, and lose it by notifying the public that it *is* his. The step which the court is asked to take in this case has already been taken by the courts in thus upholding a copyright taken out in the name of some one other than the author. When they assert, as they do, that the copyright still *belongs* to the author, and not to the person in whose name it is taken out, they have gone as far as is requested in this case. We submit that the copyright must always be "taken out" by the *author* to be valid, and if that is done, in reality, it makes no difference that the steps were taken by his agent, or that the agent's name appears at some time in the copyright notice. Such name has no warrant in law in such notice, except as a substitute for, and representative of, the name of the author.

It has been held in England that the court would enjoin a pirate from setting up in an action at law that the plaintiff did not have the legal title to the copyright when there was a real interest to be protected and the legal holder refused to allow suit in his name.

Sweet *v.* Cater, 11 Sim. 572.

In Bohn *v.* Bogue, 10 Jur. 420, the Vice-Chancellor said: —

"This court always takes notice of the equitable interest, and if the equitable title to the copyright is complete, this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property."

See, also,

Chappell *v.* Purday, 4 Y. & C. 485.

If, then, the courts are accustomed to consider the copyright in the author, without regard to the name in which it is registered, the form of registration is immaterial so long as the information called for by the statute is given. "A, B" in the fifth clause of the Act of 1831, therefore, should be construed to mean the author *or* his duly authorized representative, and the statute is substantially satisfied if the name appearing in the notice is of either. So long as the public get the information to which they are entitled, no one has a right to complain, and all the statute requires is the name of some duly authorized person to whom application can be made. The mere fact that application may be made to two persons is immaterial so long as they represent the same interest. If Emil Werckmeister, who registered his copyright in the name of the "Photographische Gesellschaft," should change his notice so as to have it in his own, instead of his trade, name, it can hardly be doubted that the copyright would be still valid, even though some copies of his work might bear the notice in one form, and some in the other. Ticknor & Fields were, so far as the publication of "The Professor at the Breakfast Table" was concerned, a trade name for the author. They published the story in magazine form; they were also the publishers of the book. So far as the public was concerned, Ticknor & Fields were Dr. Holmes, and Dr. Holmes was Ticknor & Fields; for all practical purposes the names were interchangeable. If Mrs. Stowe, for example, had written her book when she was "Harriet Beecher," and notice had been given in that name, she certainly would have been entitled to print a notice in the name of "H. B. Stowe" after her marriage. Mrs. Terhune could clearly have substituted her own name for that of her *nom-de-plume* "Marian Harland" without invalidating her notice.

Scribner *v.* Clark, 50 Fed. Rep. 473.

"Mark Twain" may use his own name in the notice in his books. So, if a name has been changed by proper authority, the new name would be properly printed in the notices after such change. Therefore mere literal repetition of the name in which entry was originally made is not essential. It is true that the change of name to that of an entire stranger to the copyright would not be a compliance with the statute, but our contention does not extend that far. There must be some identity of interest in the names, but within that limit a change of name in the notice should not destroy copyright.

5. A magazine copyright, so-called, is distributive and secures to each contributor the right to his own work and to republish it and give notice in his own name.

When the publishers register a magazine for copyright, such right, when secured, is, and must be, distributive, and each author who has permitted publication of his work in a given issue of a magazine is secured in his right to multiply copies of his work in any other form permitted by his contract. It is making too literal an interpretation of the statute to say that when he cuts loose from the magazine and publishes his book in separate form, he is obliged to use the name of the publisher of the magazine in order to give notice of his *own* copyright. That right is either held in trust for the author by the publisher, or, under the wording of Act of 1831, accrues directly to the author. Which of these two views is the correct one is immaterial here, for equity looks through the form of the transaction, and in construing the statute and the interpretation to be given to the letters "A, B" in the fifth section, this court will make such interpretation as will best subserve the interests of the author.

A magazine copyright is *distributive*, and "secures," to use the language of the Constitution of the United States, to each author publishing his work in the magazine his copyright. Whatever rights the publishers secure by entry in their own names are, except for the protection of their own interests in the copyright under the publishing agreement, held for the benefit of the respective authors contributing to the volume. By complying with the terms of the statute, the publishers secure to each *author* copyright on his work appearing therein. The publisher may by his contract have a limited interest therein, but it none the less is the sole property of the author to whom alone the constitution and the statute *secure* the right. That right in such case may be enforced directly by the author without the intervention of the publisher even in name.

Lawrence *v.* Dana, *ubi supra.*

Twenty contributors to a magazine which has been duly entered for copyright by the publishers may each protect his right. We beg to repeat that it should be borne in mind throughout this discussion that copyright belongs to the author until he parts with it, and it belongs to him none the less because the steps required by the statute to secure it have been taken in the *name* of his publisher.

6. Even if the magazine notice is construed to refer only to the magazine, and the book notice to the book, as contended by appellees, the copyrights relied on are nevertheless valid.

Our statutes in substance prescribe that before publication the author shall give notice, by depositing his title, that he does not intend to dedicate his work to the public; next, that he shall deposit copies of his work for the purpose, among other things, of identifying it; and finally, that he shall give continuing notice in the work itself that he has complied with the law. All these things have been done in the cases at bar, by parties authorized to do it, and *done twice*, and the question is whether the two attempts to "secure" property defeat each other. The appellees' contention is that they do. In the case of Mrs. Stowe's book, they say that the notice in the subsequent magazine publication is a notice of the magazine copyright only, and cannot be held to refer to her book copyright; in the case of Dr. Holmes' book, that the notice in the book is of the book copyright and cannot be held to refer to the magazine copyright on the last chapters. Double compliance with the statute, it is claimed, is a two-edged sword cutting both ways.

The injustice of this contention is manifest in "The Minister's Wooing"; for the appellees, copying from the magazine, are notified on the titlepage that it is copyrighted. Their only defence against the copyright so asserted is the prior publication in book form. But that prior publication cannot be found *without also finding the notice of book copyright.* So far from being misled, the reprinter cannot find a loophole of escape without finding also a valid copyright. The same is true of "The Professor." The appellee admits that he copied "word for word" from the magazine publication, and must have had notice of valid copyright before his eyes. He cannot find the alleged defective notice in the book without becoming aware that, beside the effort the publisher made to protect the work, the author has also sought to do the same for the completed work.

So the question, taking the appellees' standpoint, as to the limited effect of the notices, is this: *When two efforts to "secure" a literary work have been made, either of which would be valid unless destroyed by the other, are both invalid?* No case has decided anything of the kind. All the cases have dealt with a single compliance with the statute, notice of some part of which compliance has been wholly omitted. There is nothing in the statute which

prohibits "securing" literary property twice. If the certificate of the Librarian of Congress was a grant of a right of property, a subsequent grant of the same right to the same property would be ineffectual and perhaps a nullity. But it is not. The second certificate is merely an evidence that the author has again declared his intention not to dedicate his work to the public; that he has again complied with the statutory requirements for "securing" to himself the work of his brain. And so of the *notice* of the second compliance. It is a reassertion of the intention not to dedicate, and not a defective notice of the original assertion.

Can it be that a second declaration of an intention to retain property, and continuing notice of such declaration, are a dedication of that property to the world? Much the broader and fairer view is that repeated performances of statutory requirements confirm each other. The defence that notice has been given in some instance of some other compliance with the statute answers itself. It is a notice of an independently valid and effectual compliance with the statute, and again "secures" the right of property already existing in the author.

This is the point on which the Court of Appeals seems largely to have decided the cases. The court says (Rec. No. 267, p. 19), "In the volumes published by Dr. Holmes no notice was given, or intended to be given, of the copyright taken out by Ticknor & Fields." This may well be true, but the *intention* with which a notice is given is of no importance. In Holmes *v.* Hurst this court said it made no difference what Dr. Holmes' intentions were in his serial publication, it was what he did. We adopt that view in reply to the court below. If Dr. Holmes' notice is a notice that his work had not been dedicated to the public, but that his rights therein had been "secured," it makes no difference whether he meant that he had secured them, or meant that his publishers had secured them for him.

The court goes on to say (Rec. No. 267, p. 15), "There cannot be two successive copyrights on the same publication." We agree that an author cannot, by entering his work a second time, extend the copyright period. The courts will certainly hold him to the date of his original entry; but if, by some accident or mistake, or for greater caution, he, or his agent, enter it twice or several times, will it be said that the notices accompanying the publication under each entry can refer only to that "entry," and the copyright is bad because there is no notice of the original entry? Suppose, by arrangement, a work is issued in New York, Chicago and San

Francisco by different publishers, and each for safety sends on the title page and two copies, and gives notice in his own name, will the copyright be lost because two of the notices do not apply to the one which reached Washington first? The common practice to-day of syndicating important articles and publishing them in a newspaper in each of the important cities is an illustration of the severity — the unnecessary severity — with which such a rule would work. Many of the newspapers are entered for copyright, and each notice, except the one first received, would, under this contention, be held no notice because it referred to a different entry from the first one.

We submit that there is often a misapprehension of the word "copyright." In some cases the word is used as if the receipt which the Librarian of Congress issues on the deposit of a title and two copies was itself property or conveyed property. It is used as if it was a grant of a monopoly by the sovereign as Letters Patent are. The receipt is nothing but a memorandum that two of the required steps for "securing" copyright have been taken. The copyright itself inhered in, and belonged to, the author unless, and until, he gives it away by publication without entry, deposit and notice; unless, in other words, he dedicates it to the public.

It is to be observed that we are not dealing with the question of a copyright notice which gives an earlier year than the true one. There a new element comes in, and the notice is bad because it is misleading and claims too much. These notices are all of the year 1859. The statute has carefully refrained from requiring the month and day to be set out in the notice. If the omission in the statute was not intended to cover exactly such cases as these, it admirably accomplishes that result. When a general notice of the year is correctly given nothing more is required, leaving the expiration day to be determined by an examination of the entry, and, if there are several, by the date of the earliest one.

(c) The statutory protection of literary property is a compensation given by the public to the author for dedicating his work to the public, and the public faith is pledged to secure him in his rights.

It is now so well settled that citation of authorities is unnecessary, that the basis of literary property is the intellectual labor necessary to its production.

Bleistein *v.* Donaldson Lith. Co., Decision in this Court, Feb. 2, 1903.
Walter *v.* Lane (1900), A. C. 539.
Henderson *v.* Tompkins, 60 Fed. Rep. 758.
Brightley *v.* Littleton, 37 Fed. Rep. 103.
Carlisle *v.* Colusa County, 57 Fed. Rep. 979.
Drury *v.* Ewing, Fed. Cas. No. 4095.

It is always enough to show that a book is in literary form, and is the result of intellectual labor. This is the basis for supporting the right of literary property in compilations, directories, telegraph codes, etc. There has never been any question that the courts will fully protect the owner's rights in a manuscript, and the most serious question before the courts in regard to the protection of literary property has been as to the effect upon such property of publication to the world. It is now elementary law that publication is a dedication to the public except in so far as the legislature steps in to preserve and secure to the author what he would otherwise lose on publication. The statute neither creates nor adds to the author's property in his literary work. It simply gives a method of protecting him in its enjoyment during such term as may be granted to him by the legislature. The courts have many times said, in discussing the provision in the Constitution of the United States granting Congress power to promote the progress of science and the useful arts (Art. 1, Sec. 8), that it gives Congress the power to enter into a contract with the author or inventor by offering compensation to him for the time and labor devoted, through an exclusive right for a limited time.

Grant *v.* Raymond, 6 Pet. 218.

While it was said, *obiter*, in the majority opinion in

Wheaton *v.* Peters, 8 Pet. 591.

that the statute created a new right, that is entirely true in the sense in which it was probably intended by the Justice delivering the opinion. As was pointed out in that case, and has been repeatedly said by this court, there is no common law of the whole United States under which literary property could be supported. The common law in this country was brought by the colonists to each colony, so that so far as the United States were concerned this statute did create a new right by giving to the author rights

throughout the entire country, which, except for this provision of the Constitution, he would have had to seek, as before the Constitution, by statutes from each of the separate states.

Curtis on Copyright, p. 80.

The doctrine of Grant v. Raymond fully applies to this case.

We would call especial attention to the instructive opinion of Chief Justice Marshall in

Grant *v.* Raymond, *supra*,

where he discusses at length the relation between the Government and the patentee, and as a patentee's and author's rights are derived from the same clause of the Constitution, the views of the Chief Justice apply with equal force to the relation between the Government and the author.

In that case a patent had been issued with defective specifications so that it did not cover the machine as invented and constructed. The Secretary of State reissued the patent with corrected specifications, and the question arose whether this could be done, or whether the patentee was not bound by his first specifications. The court took the broadest possible ground, and decided that such reissue might be made when the original defect arose from inadvertence or mistake and without any fraud or misconduct on the part of the patentee. The Chief Justice goes on to say: —

"To promote the progress of useful arts, is the interest and policy of every enlightened government. It entered into the views of the framers of the Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries' is among those expressly given to Congress."

In referring to the patent (and the language is entirely applicable to a copyright) he says (the italics are ours):—

"It is the reward stipulated for the advantages derived by the public from the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to *execute the contract fairly* on the part of the United States, where the full benefit has been actually received; if this can be done without transcending

the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time *the public faith is pledged*. That sense of justice and of right which all feel, pleads strongly against depriving the inventor of the compensation thus solemnly promised, because he has committed *an inadvertent or innocent mistake*."

Further on in the opinion he says: —

"The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use and sell the things discovered for a limited time. That which gives complete effect to this object and intention, by employing the same means for the correction of inadvertent error, which are directed in the first instance, cannot, we think, be a departure from the spirit and character of the act";

and, later,

"The communication of the discovery to the public has been made in pursuance of law, with the intent to exercise a privilege which is the consideration paid by the public for the future use of the machine. If, by an innocent mistake, the instrument introduced to secure this privilege fails in its object, the public ought not to avail itself of this mistake, and to appropriate the discovery without paying the stipulated consideration. The attempt would be disreputable in an individual, and a court of equity might interpose to restrain him."

See, also, the opinion of Hopkinson, J., in the Circuit Court in

Wheaton *v.* Peters, 8 Peters, Appendix II.

In

Kendall *v.* Winsor, 21 How. 322,

Daniel, J., points out that the remuneration of genius is a duty incumbent upon the public, and while inventors (and equally authors) are bound to diligence and fairness in their dealings with the public, they are by obligations equally strong entitled to protection against frauds or practices to pirate from them the result of their thought or invention.

The courts in England have been equally strong in referring to copyrights. Lord Hardwicke said, in

Gyles *v.* Wilcox, 2 Atk. 141,

"As to what has been said by Mr. Attorney-General of the act being a monopoly, and therefore ought to receive strict construction, I am quite of a different opinion, and that it ought to receive a liberal construction, for it is very far from being a monopoly, as it is intended to secure the property of books in the authors themselves, or the purchasers of the copy, as some recompense for their pains and labors in such works as may be of use to the learned world."

See, also, the remarks of Lord Cairns in

Maxwell *v.* Hogg, 2 Ch. App. 307 at p. 318.

In

Beckford *v.* Hood, 7 T. R. 620,

Lord Kenyon said, with reference to the case then before him, where the owner of the copyright failed to make proper registration thereof at Stationers' Hall: —

"All arguments in support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed."

(*f*) *The history of the copyright idea in America shows the solicitude of the State for the author and his rights.*

The history of the copyright idea in America shows the solicitude of the legislatures for the protection of the author. Prior to the adoption of the Constitution twelve of the thirteen colonies had adopted copyright statutes.

Bulletin No. 3 of the Copyright Office.

Most of these laws were passed in pursuance to a recommendation of the Continental Congress to the several states, to secure to the "authors or publishers of any new books" copyright for a limited term. Connecticut, Massachusetts and Maryland passed acts prior to this resolution, and all have somewhat ornate preambles, setting forth the benefit to the state of the encouragement of literature and genius. The preamble of the Massachusetts Act is to be particularly commended to the attention of the court:

"Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of

human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences; as the principal encouragement, such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind: Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind," etc.,— then the enacting clause provides that all books, etc., "shall be the sole property of the said author or authors."

A number of the statutes of the other states contain preambles of the same description, and practically every statute uses the word "secure." In North Carolina it was said:—

"Whereas, nothing is more strictly a man's own than the fruit of his study, and it is proper that men should be encouraged to pursue useful knowledge by the hope of reward, and as the security of literary property must greatly tend to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce, etc."

And in Georgia it was provided that "such security may encourage men of learning and genius to publish their writings." And the same language is used in New York. The original copyright act of the first Congress was "An act for the encouragement of learning by securing copies, etc., during the times therein mentioned."

We submit, therefore, that it is not only the privilege, but the duty, of this court to construe the statute in question for the protection of the author so far as that can be done without acting in direct controvention to the express wording of the statute.

The origin of the provision for notice of copyright.

The provision of the statute requiring copyright notice in each copy of a book did not appear in the original Copyright Act of 1790. It first appeared in the Act of 1802,

Bulletin No. 3, p. 33,

and its origin may be traced to two sources. The original Copyright Act of 1790 extended only to a map, chart or book,

Bulletin No. 3, p. 30.

The Act of 1802 extended protection to the "arts of designing, engraving and etching, historical and other prints."

Bulletin No. 3, p. 32.

This portion of that act (Sects. 2, 3 and 4) was taken almost bodily from the Statute of 8 Geo. II, c. 13, which was the original English statute passed to protect engravings, twenty-five years after the passage of the original Copyright Act of 8 Anne, c. 19. See

Curtis on Copyright, App., p. 8.

The English act required, as does Sect. 2 of the United States Act of 1802, the engraving upon the plate of a copyright notice. This requirement of notice is, therefore, clearly traceable to the English Engraving Act, and the English decisions thereon may be referred to for its interpretation.

The first section of the Act of 1802, however, provided that the copy of the record in the office of the clerk of the District Court, where by the terms of the original Copyright Act the title of the book sought to be protected had to be recorded, must be inserted at full length on the title page, or on the page immediately following, if a book; or if a map or chart, in a short form the same as was to appear on engravings. This requirement of publication of the record was apparently taken from the Pennsylvania Statute of 1784, Sect. 6, as no trace of such a provision can be found elsewhere.

Bulletin No. 3, p. 19.

This clause was not in the original draft of the act as first ordered printed by the legislature, but seems to have been added by a committee to which the bill was referred.

Minutes of the First Session of the Eighth Gen. Ass. of Pa. for Nov. 26, 1783.

Pennsylvania, however, had at all times a friendly disposition towards the protection of literature, and the twelfth article of Penn's Frame of Government in 1682 provided that, —

"The government and provincial council shall erect and order all public schools, and encourage and reward the authors of useful sciences and laudable inventions in the said provinces and territories thereof."

2 Proud Hist. Pa., p. 11.

The Pennsylvania Act itself states that it was passed in conformity to the resolution of the Continental Congress.

(g) The history of the notice clause shows that its purpose is merely to prevent the ignorant from being misled to their harm.

The historical reason for this provision as to notice makes a strong argument against any literal interpretation of the statute. The Statute of Anne did not require any notice of copyright to be inserted in the printed work, but did require notice to the public by registration at Stationers' Hall, and Section 2 of that act gave as the reason therefor that "Whereas many persons may ***through ignorance offend*** against this act unless some provision be made whereby the property in every such book . . . may be ascertained."

Lord Kenyon confirms this view in

Beckford *v.* Hood, 7 Term Rep. 620,

where he says: "There was a reason for requiring entry to be made at Stationers' Hall. It was to serve as ***a notice and warning*** to the public, that they might not incur the forfeiture of penalties before enacted against such as pirated the works of others."

This language from the Statute of Anne was copied in the third section of the Maryland Act, provision being there made for registration with the clerk of the General Court.

Bulletin No. 3, p. 14.

The same is true of the South Carolina Act, registration being there required with the Secretary of State.

Bulletin No. 3, pp. 20, 21.

All of the states except Rhode Island and New Hampshire followed the English statute in requiring registration, and the provisions in the Acts of Congress for publication of the certificate of registration in a newspaper and, subsequently, for printing it in the work itself, seem to have been outgrowths of that solicitude for persons who "may through ignorance offend against the Act."

(h) The English decisions on their notice clause show that the name in a notice may be changed as

the proprietorship of the copyright changes, so long as the change is not misleading.

Taking up first the interpretation of this notice clause in the English Act and the reasons given for its existence, the court in

Sayer *v.* Dicey, 3 Wils. 60 (1770),

say that the reason for imprinting the date and name on the plate is "that any person may know when the proprietor's exclusive right ceases, and when, and against whom, he may be guilty of offending contrary to the statute."

Thompson *v.* Symonds, 5 T. R. 41 (1792), was an action on the case for pirating a print, and it appeared in evidence that the copyright had been sold and the copyright notice changed so as to appear in the name of the vendee instead of the original proprietor, and prints had been issued from the plate so changed. During the argument counsel contended that, —

"The conditions of inserting the date of the print and the name of the proprietor were imposed for the purpose of informing the public when the exclusive right of selling would expire, and who was the real proprietor at the time, in order that his consent might be obtained previous to any copy being taken. . . . The object of the act in requiring the date was to give information when the right will cease, not when it began, and if the date in this case had been altered, as well as the name, the public would have been *misled*. . . . When the right was transferred to the plaintiff it became necessary to insert his name instead of Bowyer's, in order that persons ***wishing to copy*** it might know whose consent to ask for that purpose."

It is important to note the emphasis laid by counsel on the purpose of the statute to prevent the public from being misled, as this word ***misled*** has been dwelt upon in construing our own copyright notice, both by this Court and on many occasions by the Circuit Courts.

Lord Kenyon, C. J., said : —

"It should seem that the reason for requiring the name and date to appear on the print was that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems therefore necessary that the date should remain, but that the *name of the proprietor should be altered as often as the property is changed.*"

Vice-Chancellor Malins took the same view of the requirement for registration at Stationers' Hall, and held that the proprietor at the time of registration, and not the original proprietor, should register.

Weldon *v.* Dicks, L. R. 10, Ch. Div. 247, at p. 253.

In the latest English case, Brittain *v.* Hanks, 18 Times L. R. 525, it is said: "The effect of [the Statute] is that the date must not b e***misleading.***"

In

Newton *v.* Cowie, 4 Bing. 234 (1827),

Best, C. J., speaking of this notice, said: —

"The words of the act are satisfied by the disclosure of the proprietor's name. This is a sufficient indication of the person who is to be applied to for *leave to copy the print;* coupled with the date, it shows how long the designer has had the monopoly, and fully accomplishes the two objects of the act."

In

Rock *v.* Lazarus, L. R. 15, Eq. 104 (1872),

the copyright notice had the name of "Rock & Co." as proprietors, the trade name for a partnership containing persons whose names were not Rock. Malins, V. C., in holding this notice sufficient, said: —

"I think that the trading name of the firm is a sufficient designation, inasmuch as it enables parties to know whom to apply to for information, and whom they must sue."

We submit, therefore, that under the English law the notice in this case, whether in the name of the publisher or of the author, gives all the information which the statute contemplated.

II.

Copyright can be secured for part of a work.

It is well settled that copyright can be secured for part of a work. This was determined in England with reference to another book of Dr. Holmes', "The Guardian Angel."

Low *v.* Ward, L. R. 6 Eq. 415.

In that case Dr. Holmes, while publishing his work serially in the *Atlantic Monthly*, went to Canada, after the whole of the story

had so appeared except the last six chapters, and took steps to obtain an English copyright on the whole book. This copyright was upheld as to the last six chapters, and an injunction issued "restraining defendants from printing or selling any copies containing the last six chapters of the work."

Vice-Chancellor Giffard said: —

"The only ground on which this motion was resisted was, that there could not be copyright as to a part of a work only. But there are numerous cases showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's 'Childe Harold,' 'Croker's Notes to Boswell's Life of Johnson,' and of particular articles in cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only. It was not, in my opinion, incumbent upon Professor Holmes to give notice of his intention to claim copyright in this country, and I see nothing to deprive plaintiffs of their right to an injunction as to the last six chapters of the work."

In Cary *v.* Longman, 1 East, 358, the complainant had made material additions to an old road book and sought to restrain an infringement of his copyright. Lord Kenyon said: —

"Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book. . . . The courts of justice have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole book. I remember it was thought otherwise in the case of Mr. Mason (Mason *v.* Murray). Several of Mr. Gray's poems had been for many years before published, which were collected by Mr. Mason, and published with the addition of several new poems; but though he had not a property in the whole book, yet the defendant having copied the whole, the Lord Chancellor granted an injunction against him as to the publication with the additional pieces. So Lord Hardwick in another case granted an injunction to restrain the defendants from printing Milton's 'Paradise Lost,' with Dr. Newton's Notes; although there was no doubt but that they were at liberty to have published the original work itself without the notes."

See, also,

Kipling *v.* Putnam, 120 Fed. Rep. 631.
Reid *v.* Maxwell, 2 Times L. R. 790 (Ct. of App.).

Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618.
Harper *v.* Shoppell, 26 Fed. Rep. 519.
White *v.* Geroch, 2 B. & Ald. 298.
Drone on Copyright, 144–149.

In Lawrence *v.* Dana, 4 Cliff. 1, the new matter consisted of notes to an old work, and it was held that copyright was duly secured, although the copyright notice was in the usual form and purported to apply to the whole book.

It is evident that this must be so. The statute makes no provision for any variation in the form of the notice, and, in many cases, such a variation would be an impossibility, as, for instance, in case of a new edition of a dictionary where small changes may be scattered over every page, or in case of the revision of a legal text-book where the new matter may vary all the way from verbal changes or additions of citations to long and elaborate notes.

If the defendants mean to contend that these copyrights are invalid because the copyright notices preceded the entire work instead of the last chapters, and that the notices must be so placed as to call attention to the difference between the copyright and non-copyright matter, then they must also concede that such a rule would be impossible of application in a vast majority of cases where copyright and non-copyright matter are printed together. The fallacy of this contention is seen in its application to directories or compilations of non-copyright materials, or reports of judicial decisions, where it has always been held that the reporter's own work was copyrightable although the decisions themselves were not.

In Black *v.* Henry G. Allen Co., 42 Fed. Rep. 618, it was held that the copyright on an atlas covered each individual map constituting the atlas.

It is to be noted that the copyright secured on the December number of the *Atlantic Monthly* covered each and every article in it. Under the contention of the appellees, however, the copyright claimed and secured by Ticknor & Fields did not, and could not, extend to any instalment of a continued story appearing in that issue unless copyright had been duly claimed and secured in all the preceding issues of the magazine containing any part of such story. If, for example, through some technical slip, the copyright had failed on the January number in which the first instalment of the story had appeared, under this contention the entire copyright on the work would be gone, even though none of the rest

of it had been written or even fully conceived in the author's mind.

The claim that the work is an entirety and copyright must include the whole of it in order to be valid is, in another form, the argument used by the distinguished counsel for Dr. Holmes in his effort to protect "The Autocrat of the Breakfast Table" in an earlier suit (Holmes *v.* Hurst, 174 U. S. 82). It was there contended that the copyright on the book as an entirety could be secured under the statute, even though the work had been previously published as a serial in a magazine. It would be hard indeed if the argument which could not save the author on his first book should now be held valid to defeat him on his second.

III.

There was no change of title, in the case of "The Professor."

The contention is made that although copyright on the last instalment of the "Professor" was duly secured, yet it has been lost because the whole work was subsequently published in book form under a different title from that under which copyright was secured. The copyright relied on was secured in connection with the other contents of the *Atlantic Monthly* for December, 1859, and the story was published in book form under its proper title, and the title given to it in the magazine.

It is submitted that this contention is not well founded. The statute nowhere provides that, after copyright is duly secured by entry, the author may not change the title of his work as often as he pleases without imparing the validity of his copyright. All that the statute required was that a printed copy of that title, and a copy of the book, should be deposited with the Clerk of the District Court before publication. This was done. Ticknor & Fields duly deposited the title of the December number of the *Atlantic Monthly* and also a copy of that number bearing that title, and copyright was thereby secured for the entire contents of that issue of the magazine.

There is no magic in a title. It is no more than a convenient method of identification, and is not in itself the subject of copyright. The copyright does not protect the title, because copyright is nothing more than the right to multiply copies of the author's work, and the title cannot be protected except as an appendage to the work it identifies. It is submitted that where protection has

been given to a title, it was not given under the copyright law, but under the general principles of equity to secure protection from unfair competition.

Every magazine is an illustration of the rule that the title has nothing necessarily to do with the contents, as the magazine title never changes, while its contents are always changing. There can be no copyright in a magazine title.

Osgood *v.* Allen, 1 Holmes, 185.

See, also,

Jollie *v.* Jaques, 1 Blatchf. 618.

If there were any substantial foundation for this objection, it might be urged that there is nothing in the language of the statute which prevents an author from changing the title between the time that he records it and the time that he deposits copies of the book.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

In this case Judge Townsend said: —

"Complainants' counsel insists that, even if the authors at first contemplated copyrighting their productions as a single volume, they might change their minds, and pursue the course which they did. No decisive authority is cited, sustaining either claim. It is easily seen that an author may find it to his advantage to change the title of his work between the time of his taking his first step toward obtaining a copyright and the actual publication of the book. I do not think that the courts should hold that such change of title renders a copyright invalid, unless compelled to do so, and I do not think they are so compelled."

The contention of the appellees on this point leads to the neces sary result that if an author publishes a story in a magazine and his copyright is duly secured by the entry for copyright of the issue, or issues, of the magazine containing it, he cannot publish it in separate book form except under the title of the magazine where it appeared. If, for example, the publishers of the *Atlantic Monthly* had duly entered for copyright each number during the year 1859, the author's copyright, because belonging to him under the terms of his contract with the publisher, would be unimpeachable, but he would be limited in the title of his book when published separately to

"*Atlantic Monthly numbers 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26,*"

these being the titles under which the issues of the magazine containing the serial were originally published and entered for copyright; and, under a literal interpretation of this extraordinary proposition, the words "*Atlantic Monthly*" would have to be repeated twelve times, once for each number. This title would be both misleading and absurd, because every other serial story republished from the same numbers must bear the same title. The title of the author's selection and the one with which the story was associated in the public mind could not, therefore, be used, except, perhaps, as a sub-title; and even then, under a literal construction of the statute, the variance caused thereby between the title as filed and the title as published would give a technical ground for an objection to the validity of the copyright.

The appellees must necessarily take the position either that no serial story copyrighted by the publishers with the magazine can ever be published separately, or that the magazine title must always be used, although it applies to different matter in every issue. The true answer to this contention is, however, that copyright was secured for the last instalment of "The Professor at the Breakfast Table," appearing in the December number of the *Atlantic Monthly*, for 1859, through a strict compliance with the terms of the statute. As has been said, the title of the copy of the December number deposited corresponded exactly with the title separately deposited, and copyright on the entire contents of that issue was thereby secured. When the necessary acts for the registration of the copyright have been done, the statute is silent as to the way in which the author reaps the benefit of the right so secured, so long as the required notice of copyright continues to be given. It makes no difference whether the work on which the copyright has been secured is published under the title under which it was claimed, or whether it is buried as an appendix to a work on a different subject, or whether the author gives a new title to each new edition. The copyright, having been once secured, exists during the full term allowed by law, irrespective of the title. President Walker's copyright on his work on the United States was not lost because he allowed it to be published as part of the contents of Volume XXIII of *The Encyclopædia Britannica* and under that title.

Black *v.* Henry G. Allen Co., 56 Fed. Rep. 764.

It is to be noted that the title of the work as published in *book* form was identical with that given to it in the *serial* publication.

We submit, however, that there is nothing in this claim, for t reason that copyright on a magazine is *distributive*, because tak for the benefit of the several authors, and the title deposited serv no other purpose than to point to the various titles of the seve articles making up the contents of the magazine. The deposit the title of the magazine conformed to the letter of the law, but order to fulfill the true purpose of the statute, it must be taken including all the various sub-titles.

In Johnson *v.* Newnes, L. R. 3 Ch. 663, the plaintiff was author of a series of stories which he published serially and co righted under the general title of "Birds of the Night." One the series, with the sub-title "The Cabman's Story," was publish separately under the latter title, and the objection was made t the title as registered was not used. The court, however, h the variance immaterial.

IV.

Copyright was duly renewed by Dr. Holmes.

It is further objected that the copyright entered by Tickno Fields, on the *Atlantic Monthly* for December, 1859, expired in 18 and was not renewed. It is true that Ticknor & Fields ne renewed any copyright on this issue of the magazine, but reason is that they, so far at least as Dr. Holmes' work was c cerned, had no copyright to renew. These publishers had mer a limited right of serial publication, and their right was gover by their contract with the author. The statute gives the right renewal to "*the author*," if he be living, and to no one else (R Sts. U. S., § 4954: St. 1831, ch. 16, § 2). The publishers, th fore, had no right of renewal on Dr. Holmes' work, and Holmes had certainly no right to renew the copyright on *Atlantic Monthly* for December, 1859. The author took the pro steps for renewal, and the copyright was consequently d renewed. This must be considered as settled, not only under terms of the statute, but under the decisions.

Pierpont *v.* Fowle, 2 Wood & M. 23.

Certainly if the author had died during the original term of copyright, it cannot be questioned that the right of renewal wo have accrued to his widow or children to the exclusion of publishers.

SAMUEL J. ELDER,
EDMUND A. WHITMAN.
Solicitors, and of Counsel
Appellants.